Item No: 11.(a)

Council Date: April 15, 2019

Municipality Of Chatham-Kent

Integrity Commissioner

To: Mayor and Members of Council

From: Paul Watson, Integrity Commissioner

Date: April 10, 2019

Subject: Integrity Commissioner Complaint regarding former Councillor Derek Robertson – Final Report

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Recommendation

It is recommended that:

1. Council receive the report of the Integrity Commissioner.

Background

See attached report.

I will make myself available to answer any questions that Council has regarding my report.

Financial Implications

None.

Prepared by:

Paul Watson
Integrity Commissioner

Attachments:

COMPLAINT TO THE INTEGRITY COMMISSIONER OF THE MUNICIPALITY OF CHATHAM-KENT RE: COUNCILLOR DEREK ROBERTSON DATED NOVEMBER 6, 2018

Introduction

This matter came to the attention of the Integrity Commissioner when a formal complaint was made on November 6, 2018 (hereinafter "the complaint"). The named Complainant has requested that I not "release his identity with regard to this complaint". In accordance with the Code of Conduct for Members of Council ("the Code"), I am obliged to honour this request, even though I am aware that the name of the Complainant has become known. It has been suggested that there may have been malicious intent behind the complaint. It is unnecessary for me to consider that issue. My independent review of this matter soon lead me to the conclusion that the complaint merited investigation. I have not found it necessary to interview the Complainant.

For the reasons set out in this report, I find that Councillor Robertson ("the Councillor") contravened section "14. Conduct Respecting Staff" of the Code.

Procedural Background

Section 19b of the Code sets forth the "Formal Complaint Protocol". In accordance with that protocol I provided the Councillor with the "complaint and supporting material" within 10 days of receiving the formal complaint and requested the Councillor to provide a written response, which he did and which was received on November 8, 2018.

I then, on January 30, 2019, reported the general findings of my investigation to the Councillor within 90 days of the date of the complaint and provided the Councillor with an opportunity to respond. I saw no need to provide a copy of my report to the Complainant, and therefore did not release my preliminary report to anyone other than the Councillor through his lawyer.

The unauthorized release of my preliminary report to the media by the Councillor and his lawyer has been documented in my Report to Council dated March 21, 2019, entitled "Integrity Commissioner Investigation – Interim Report Relating to Serious Breach of Protocol". This report is now part of the public record and I do not need to repeat those details in this report.

The Councillor's response and interview did not provide any factual information that I was not already aware of. This matter is not a case where the facts are in dispute in any substantial way. It is however a case where the interpretation of those facts are in dispute.

Jurisdictional Issue

Although Councillor Robertson is no longer a Councillor for the Municipality of Chatham-Kent ("the Municipality"), the complaint was received while he was a Council member and is related to his position on Council. In these circumstances, the Integrity Commissioner maintains jurisdiction to investigate and report on the matter. In support of my finding, I rely on

and adopt the findings of the decision of Valerie Jepson, Integrity Commissioner for the City of Toronto, in her "Report Regarding the Conduct of Former Councillor Doug Ford" which report is dated December 6, 2016.

The Parties

As this report deals with matters that are properly considered "personnel matters" and for reasons of privacy with respect to the parties involved, I see no need to use the actual names of the various parties. These names can be easily ascertained by the media or anyone who believes that they are important. For the purposes of this report I will refer to the parties as follows:

(i) "the owner" is the person who requested a building permit for a business located in Chatham, Ontario.
(ii) "the CAO" is the Chief Administrative Officer for the Municipality.
(iii) "the CBO" is the Chief Building Official for the Municipality.
(iv) "the GM" (General Manager) is the direct supervisor of the CBO. The GM reports to the CAO.
(v) "HR " is the Director of Human Resources for the Municipality, who reports to the CAO.
(vi) "the Municipal Lawyer" is the lawyer for the Municipality.
(vii) "the Councillor" is Councillor Derek Robertson.

Interviews Conducted and Material Reviewed

In preparing my final report, I have reviewed the following:

(i) The Complaint dated November 6, 2018.
(ii) Response to initial complaint from the Councillor received on November 8, 2018.
(iii) The "Closed Session Report" of John Norton dated October 15, 2018 entitled "Lessons Learned ….".
(iv) E-mail Correspondence between the Councillor and GM, CAO, the owner, and members of Council.
(v) I have conducted personal interviews with the following persons:
    a) CEO;
    b) GM;
    c) CBO; and
    d) The Municipal lawyer.
(vi) I have conducted a telephone interview with HR.
(vii) I interviewed the Councillor in the presence of his lawyer on March 18, 2019.
(viii) Written response of the Councillor to my preliminary report dated January 28, 2019. This report was provided to the Councillor on January 30, 2019, in accordance with section 19b of the Complaint protocol. The response was received on March 15, 2019.

(ix) The expert report, received by the owner during a court proceeding respecting this matter.

Note: As the "Response to initial complaint from the Councillor received on November 8, 2018" referred to above was marked "Confidential" I will not be quoting from it.

The Relevant Sections of the Code

Section 14 of the Code reads as follows:

*"**14. Conduct Respecting Staff***

Only Council as a whole has the authority to approve budget, policy, Committee processes and other such matters. Under the direction of the Chief Administrative Officer, staff serve Council as a whole and the combined interests of all members as evidenced through the decisions of Council.

Members shall not give direction to individual staff, save and except for the Chief Administrative Officer who shall receive his or her direction from Council as a whole or as specifically delegated by the whole of Council to the mayor or a committee of Council.

When interacting with staff, members shall use generally accepted practices of respectful interaction.

Members shall be respectful of the role of staff to provide advice based on political neutrality and objectivity and without undue influence from any individual member or faction of the Council. Accordingly, no member shall maliciously or falsely injure the professional or ethical reputation, or the prospects or practice of staff, and all members shall show respect for the professional capacities of staff.

No member shall compel staff to engage in partisan political activities or be subjected to threats or discrimination for refusing to engage in such activities. Nor shall any member use, or attempt to use, their authority or influence for the purpose of intimidating, threatening, coercing, commanding, or influencing any staff member with the intent of interfering with that person's duties, including the duty to disclose improper activity.

In practical terms, there are distinct and specialized roles carried out by Council as a whole and by Councillors when performing their other roles. The key requirements of these roles include dealing with constituents and the general public, participating as Committee members, and participating as Council representatives on agencies, boards, commissions

and other bodies. Similarly, there are distinct and specialized roles expected of Municipality staff in both the carrying out of their responsibilities and in dealing with the Council."

Section 10 of the Code reads as follows:

*" **10. Improper Use of Influence***

No member of Council shall use the influence of her or his office for any purpose other than for the exercise of her or his official duties.

Examples of prohibited conduct are the use of one's status as a member of Council to improperly influence the decision of another person to the private advantage of oneself, or one's parents, children or spouse, staff members, friends, or associates, business or otherwise. This would include attempts to secure preferential treatment beyond activities in which members normally engage on behalf of their constituents as part of their official duties. Also prohibited is the holding out of the prospect or promise of future advantage through a member's supposed influence within Council in return for present actions or inaction.

For the purposes of this provision, "private advantage" does not include a matter:

- *that is of general application;*
- *that affects a member of Council, his or her parents, children or spouse, staff members, friends, or associates, business or otherwise as one of a broad class of persons; or*
- *that concerns the remuneration or benefits of a member of Council".*

Findings:

The Councillor believes that he was properly acting as an advocate for a constituent who had a unique business proposal that would benefit the Municipality. The Councillor believed that the Building Department, and in particular the CBO, were creating barriers to development in the Municipality by being too restrictive or too inflexible in his application of the Building Code when receiving building permit applications from Municipal businesses and residents.

Regardless of the above, I find that the Councillor's actions resulted in a breach of s. 14 of the Code. My report is set out below.

Background:

In 2016, the owner contacted the Municipality to inquire as to the permitted uses for a commercial building that he owned in Chatham.

The property was previously a furniture store which, under the Building Code, was defined as "mercantile use". The owner sought to change the "use" of the building. The owner sought a mixed use for the building, involving a retail use and some other commercial/business use. Regardless of the primary use, the secondary use was for a purpose that would require the issuance of a Liquor License. The existing zoning permitted the serving of alcohol for up to 30 persons. If the owner sought to serve more than 30 persons he would require "an assembly occupancy" which would necessitate a building permit for change of use. This change of use would require certain renovations to the building.

In February of 2017, the building department facilitated the approval of a liquor license based on the mercantile occupancy for up to 30 persons. At that time the property was being used primarily as a retail store and secondarily as a café that would serve alcohol.

On October 13, 2017, the owner sent the Councillor an e-mail requesting assistance regarding a disagreement between the owner and the Building Department over site plan requirements and Building Code issues. The Councillor then helped facilitate a meeting between the owner, the Councillor, the CAO, the GM, the Mayor and representatives from the Planning Services Department, Building Development Department and Engineering Department which was held on Wednesday, October 18, 2017, at 1:00 p.m.

In March 2018, the owner applied for a building permit and provided plans for renovations to the building that would allow for up to 400 persons to be served. In layman terms, the renovations would change the use of the property from a "store" to a "bar". The owner's engineer provided drawings of the proposed renovated building. These drawings had calculated the number of washrooms required based on the owner's position that the change of use was to a use that met the definition of a "dance hall". This change of use would require minimal changes to the number of washrooms. The owner was anxious to proceed with his renovations and pressure was put on the Building Department to move quickly to issue the permit.

On March 6, 2018, a building permit was issued which would allow renovations to proceed to change the use of the building to include a bar that could serve up to 400 persons. On March 16, 2018, the CBO advised the owner, through his lawyer, that the permit issued on March 6, 2018, was in error, in that it had underestimated the number of washrooms that were required for occupancy of up to 400 persons. More particularly, the Building Code regulated the number of "water closets" required. The building permit had been issued on the premise, as proposed by the owner, that the building was going to be used as a "dance hall". The CBO, in reviewing the application, as presented by the owner, concluded that the proposed use of the property was not that of a dance hall but was, in essence, to be used as a bar with other mixed uses. This required more "water closets".

The CBO had the authority to immediately revoke the building permit that had been issued in error. A new permit would then be issued, provided the requirements of the Ontario Building Code were met. This was commonly done in situations such as this and is in accordance with the provisions of the Building Code.

The Involvement of the Councillor

The owner and his engineer were of the opinion that the owner's use of the building met the definition of a "dance hall" and that the permit was not issued in error and should not be revoked/changed. The CBO, who has an independent statutory duty to ensure compliance with the Building Code, disagreed.

When the CBO indicated to the owner that he intended to revoke the permit, there was an immediate response from the owner to prevent the permit from being revoked. The matter escalated to the point that has been described by the administrative personnel involved as being "unprecedented" in their experience.

The matter proceeded through numerous meetings where the focus became the number of washrooms that would be required. The owner wanted to increase the capacity for serving liquor to up to 450 patrons. The CBO insisted that this would require an increase in the number of washrooms required. The owner disagreed.

The Councillor intervened on behalf of the owner in a significant manner commencing in mid-March 2018, after the CBO had advised the owner of his intention to revoke the building permit. The owner and his lawyer were of the opinion that the CBO was treating the owner unfairly and was going out of his way to put up barriers instead of finding solutions. The Councillor expressed his opinion to the GM that the CBO was either incompetent or acting with malice. This was primarily as a result of the difference of opinion between the owner, who took the position that his change of use was to a "dance hall" and the CBO who took the position that the change of use was to a "bar" and other mixed uses.

In April 2018, the GM and CAO were receiving pressure from the Councillor for a resolution. The GM and CAO then pressured the CBO to work weekends to try and resolve this issue. The CBO advises that this was the first time in his 18 years working for the Municipality that the he had been pressured to work weekends on a Building Code matter. A further dispute arose in mid-April 2018 over whether or not the Building Code required a "fire separation" between the building and the storage sheds behind. The owner was of the opinion that these were storage buildings. The CBO had information that led him to believe that these buildings would be used as a "storage garage". The owner was of the belief that the CBO was maliciously placing road blocks into the process to prevent the project from moving forward.

The issue relating to the fire separation appears to have been resolved, but not the issue relating to the number of washrooms required. This difference of opinion and efforts to find a resolution continued into the summer. Late in the week of July 9, 2018, the Councillor advised the GM that the matter needed to be resolved to the satisfaction of the owner by the following Monday or that the Councillor would "raise the issue in closed session" meaning that it would be brought before Council in a closed (non-public) meeting and that the employment status of the CBO would be reviewed. A meeting was then scheduled for the following Sunday afternoon with the CAO, the GM, the owner, the owner's lawyer and the Councillor.

The GM came into work early on this Sunday afternoon in July 2018, to meet with the CBO so that he could be fully updated with respect to the status of the file. The Municipal Lawyer also came into work this day to join this meeting between the GM and the CBO. The Municipal Lawyer had reviewed the matter and supported the CBO's interpretation of the Building Code. Nevertheless, the CBO was able to come up with a solution that would result in less washrooms being required. One option discussed was reducing the "occupancy" that the owner would be permitted, when serving alcohol, to 280 persons, which required four additional washrooms to be installed.

A broad range of solutions were discussed at the meeting, including the Municipality using a development fund to help the owner pay for the additional washrooms that were required by the Building Code. That solution subsequently fell apart when administration determined in the days following that the project was not eligible for funding from the development fund.

The day following this meeting (July 16, 2018), the Councillor attended at the office of the Director of Human Resources ("HR") to make enquiries related to the personnel file of the CBO. The Councillor wanted to know if there were any "performance issues" noted on the CBO's file. HR advised him that there was nothing of significance. The Councillor also enquired into whether or not there had been complaints from the public regarding their interaction with the CBO. HR advised that the answer was "no". There were other occasions whereby the Councillor expressed to HR that in his opinion the CBO was incompetent and vindictive. The Councillor also expressed the same opinion with respect to the Municipal Lawyer, who had supported the CBO's interpretation of the Building Code.

The Councillor also expressed to the GM that the Municipality needed to seriously consider replacing the CBO. The GM made it clear to the CBO that his job was at risk if he was wrong in his interpretation of the Building Code. The CBO held fast to his opinion.

The Councillor in meetings with the CAO, the GM and HR always took the position that "this issue", being the CBO's position on the number or washrooms required, "needs to be resolved" and that if it was not, he had sufficient support on Council to have the CBO fired.

On July 16, 2018, the CBO was called into the office of the Director of Human Resources who advised the CBO that the Councillor had requested information from his personnel file relating to his performance record. Shortly after that the CBO was told by the GM that the Councillor wanted him "fired".

As the resolution from the Sunday, July 15, 2018, meeting was falling apart, the CBO advised the GM and the Municipal Lawyer that he was preparing to revoke the building permit. When the owner became aware of this, the owner through his lawyer, on or about July 25, 2018, served the Municipality with an emergency injunction application to prevent the revocation of the building permit. The Application also claimed significant damages against the Municipality for allegedly acting in bad faith.

When this latest development was communicated to Council by the Municipal Lawyer, the Councillor by e-mail responded in part that "This file is the straw dog file that highlights and

brings to light everything that is anecdotally said about the CK Building Department. CK demonstrates through its behavior with the building department that we are closed for business".

The hearing of the injunction was adjourned (with the building permit remaining in place) for approximately 2 weeks to allow the parties to obtain an independent third party opinion. The owner and the Municipality both obtained third party opinions. The opinion received by the Municipality supported the position of the CBO. The opinion obtained by the owner supported the owner. The opinion received by the owner in many respects simply continued the debate. This opinion provides in part that "In our experience, the classification of multi-purpose rooms is interpretative; as the use of these spaces can fall within multiple categories. However, based on discussions with the Client, it is understood that the use of the space is very similar to the type of events often hosted at a local Legion." As I have already determined, the CBO had a different opinion as to the proposed use of the building.

Shortly thereafter, the Court matter settled on the basis that the number of persons who could be served alcohol on the premises, without increasing the number of washrooms, was reduced to 120, or 200 when the retail portion of the building was closed. The CBO then cancelled the building permit and issued a new building permit in accordance with the agreement and in accordance with his authority under the Building Code.

The matter of the CBO's position with the Municipality was still a live issue. As part of the resolution of this matter, the Councillor requested, and the GM agreed, that a report of "lessons learned" would be prepared by the GM and brought into a "closed session" meeting of Council prior to the end of the Council term, which was quickly approaching. The CBO became aware of this as he was asked for his input by the GM. The CBO continued to have concerns with respect to his employment status as it was uncertain as to whether or not the presentation of the report would be used as an opportunity for the Councillor to request a review of the CBO's employment with the Municipality. Regardless of the intent, the CBO was significantly fearful that his job was in jeopardy. The Municipal Lawyer also had the same fears as the Councillor had expressed that he was wrong in his support of the CBO on this issue.

The Councillor attempted to have "a personnel issue" relating to this matter brought before Council in closed session. On July 16, 2018 the matter was postponed to the August 13, 2018, meeting. On August 13, 2018, the matter was pulled from the agenda by administration and on November 19, 2018, there being no other matters on the agenda; administration pulled the matter from the agenda and cancelled the meeting.

The fallout continued. The message was getting out that the Building Department was in essence creating too much "red tape" and was sending out the message that the Municipality was not open for business. This resulted in a local media outlet including a question that was posed to all municipal election candidates as to whether or not the Building Department was hindering development in the Municipality.

During the election (for which the Councillor was not running for re-election to Council, but was running for election to the Public School Board), the Councillor participated in a "Facebook Live" interview session in which he was highly critical of the Building Department.

During this interview the Councillor states in part "I frankly think we have a Building Department that enjoys saying "no". I think we have a Building Department that actually prides themselves from time to time on shutting down businesses and I thing that is absolutely wrong."

When asked how this matter needed to be dealt with, the Councillor states in part "I think that's probably a question that needs to be answered with some really stark frankness and needs to be deliberated on properly by, you know frankly it shouldn't have to be deliberated on by the Council, it's a task of staff and they need to address some of these shortcomings. Certainly I've been voicing it behind the scenes…..".

Not surprisingly, this live broadcast, which was also archived in a manner that would permit it to continue to be accessed, came to the attention of the CBO and the staff of the Building Department.

Fallout continued as two senior members of the Building Department resigned. These employees expressed in "exit interviews" that they felt that senior administration had failed to support the Building Department during this dispute.

The Position of the Councillor

At his interview, the Councillor was asked if "at the time you were on council was it your opinion that the CBO should be replaced?" His answer was "yes". When asked if "that is something you were going to bring before Council" his answer was "I was going to have Council review the facts of this file."

In his written response to my preliminary report, and in his interview on March 18, 2019, the Councillor maintained that he was simply doing his "duty" as a Councillor. This was based on his legal position, as expressed personally and through his lawyer, that:

(a) the CBO did not have the authority to revoke a building permit that had been issued in error except in exceptional circumstance and that any attempt by the CBO to do so was evidence of either incompetence, bad faith or both;
(b) since the Building Code Act literally provides for CBO's to be appointed by Council, that it is the responsibility of Council to monitor the decisions of the CBO and to take steps to remove him or her from office if Council is not satisfied with his or her decisions; and
(c) that Council (as opposed to the CBO) has the ultimate authority under the Building Code Act to approve or not approve building permits and therefore Council has the right to intervene in decisions where a Councillor disagrees with the CBO.

This legal position is not correct in law. That the CBO has a statutory duty to act independently is well established in Ontario law. The following is a review of the case law relating to the Councillor's legal position.

Peter Kiewit Sons Co. v. Tillsonburg (Town), 2002 CarswellOnt 1250, is a case decided by the Ontario Superior Court of Justice. In that case at paragraph 81 and 82, Justice Misener found that:

> "81 *In my view, however, a proper understanding of the Building Code Act precludes Kiewit from complaining about that position. It is surely plain from the provisions of that Act that a municipality has no authority to issue a building permit, no authority to direct that a building permit issue, and no authority to recommend that it be issued. It is the Chief Building Official who, by virtue of section 8 of the Act, has the sole statutory authority to issue a building permit, and as well the statutory duty to issue it unless one of the provisions set forth in subsection 8(s) stands in the way.*
>
> 82 *It is just as plain as well that, notwithstanding section 3 and section 7 of the Act, the Chief Building Official is entirely independent of the municipality, and he is bound in law to perform his duties entirely independent of any direction or recommendation the municipality may seek to give. When an application for a building permit is made, the proper performance of his duties obviously requires some kind of a hearing. The Act is silent as to the manner in which the hearing is to be conducted, but, in view of the provisions of subsection 8(2), I cannot imagine how it could be properly conducted, at least in contentious case, without some inquiry of the municipal authority. Nor can I imagine a responsible Chief Building Official doing other than giving an applicant the full opportunity to respond if in fact a municipality asserts that one of the provisions of subsection 8(2) is an impediment to its issuance. In the end, however, it is the duty of the Chief Building Official to proceed judicially, and in that manner to make such findings of fact or of mixed law and fact and, indeed, to apply all relevant principles of law as he understands them to be, in ultimately deciding whether or not a building permit must issue."*

In the Ontario Superior Court of Justice case of *Southgate Public Interest Research Group v. Southgate,* 2012 ONSC 5383, an application was brought before the Court to review a decision of the CBO. *Justice Ricchetti* at paragraph 45 states the following:

> *"...I agree with SPIRG that it was incumbent on the CBO to make an independent decision as to whether the Lystek Facility was a permitted use under the MI Zone. See Peter Kiewit Sons Co. v. Tillsonburg (Town) (2002), 28 M.P.L.R. (3d) 277 (Ont. S.C.J.) at para. 82."*

At paragraph 64, the Court in discussing the test for when it would intervene to review a decision of a CBO, quotes as follows:

> *"Justice Heckland in Berjawi v. Ottawa (City) (2011), 79 M.P.L.R.(4th) 280 (Ont. S.C.J.) at para. 12, described the standard of review as follows:*
>
> *Considering these principles, it must be recognized that municipal planning and zoning are specialized areas which fall within the expertise of the CBO. Most of the determinations made by CBOs in the context of by-law interpretation are mixed questions of fact and law. This requires a significant degree of deference for all but purely legal questions. For most issues, the standard of review will be reasonableness.*
>
> ...
>
> *[T]o be upheld on a reasonableness standard, the decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and both the law."*

In the Ontario Court of Appeal decision in *Pedwell v. Pelham (Town)*, 2003 CarswellOnt 1701, (Ont. C.A.), the Court at paragraph 42 states in part ("Mr. Judge" as referred to below being the CBO):

> *"However, I do not consider that to be fatal to the Respondent's case. As I read Mr. Judge's evidence, he would have issued the building permits, since the application was otherwise complete, had Mr. Breitkreuz obtained the necessary approvals from the Health Unit. There is evidence that other Town officials told Mr. Judge to "hold off" in giving the permits. While Mr. Judge was entitled to seek advice from whomever he thought would assist him in making his decision, he could not refuse to issue the permits, if they otherwise complied with the law. I agree with the trial judge that if the Town officials ordered Mr. Judge to refuse the permits, this would be an improper interference in his duties."*

And at paragraph 55 states:

> *"The appellants submit that Mr. Judge had the right to consult with Town officials before issuing the building permits. The trial judge stated the following:*
>
> *Surely it is imperative that the other Town officials not interfere with the Chief Official in the performance of the duties imposed upon him pursuant to section 6 of the Act. Once he has been appointed he should be left alone to perform the functions entrusted to him. If the Chief Building Official is to deal fairly with each application, it is imperative that any such decision making be done impartially. The true measure of impartiality is the ability of the judge or other official to take some distance from his own preconceived notions and prejudices to arrive at a fair decision, looking only at the issues in question. Mr. Judge therefore should have reached his decision without consulting all other planners and officials and the decision*

should have been made on the basis of the requirements outlined in section 6 of the Act and not on the basis of extraneous concepts and policies."

This decision in this case was appealed to the Supreme Court of Canada who refused to hear the appeal – see *Pedwell v. Pelham (Town),* 2004 CarswellOnt 886 (S.C.C.).

On the issue of whether or not the CBO has the authority to revoke a building permit that had been issued in error, section 8(10) of the *Building Code Act* provides as follows:

> *"**Revocation of permits***
> ***8(10) Subject to section 25, the chief building official may revoke a permit issued under this Act,***
> ***(a) if it was issued on mistaken, false or incorrect information;***
> *(b) if, after six months after its issuance, the construction or demolition in respect of which it was issued has not, in the opinion of the chief building official, been seriously commenced;*
> *(c) if the construction or demolition of the building is, in the opinion of the chief building official, substantially suspended or discontinued for a period of more than one year;*
> ***(d) if it was issued in error;***
> *(e) if the holder requests in writing that it be revoked; or*
> *(f) if a term of the agreement under clause (3) (c) has not been complied with. 1992, c. 23, s. 8 (10)."*(emphasis added).

Chang (In Trust) v. Toronto (City), 2009 CarswellOnt 5107 is a decision of the Ontario Superior Court of Justice. At paragraph 30 and 31, Justice MacDonnell states as follows:

> *"30 I agree with Mr. Chang that **the CBO does not have inherent jurisdiction to revoke a building permit, and that the authority to revoke must be found in ss. 8(10) of the BCA**. The CBO justified revocation in this case on three of the bases set forth in that provision. In my view, Mr. Chang has not shown that the CBO incorrectly interpreted the provision or that he applied it in an unreasonable manner.*
>
> *31 The first and third of the grounds relied upon by the CBO - that the permit was issued on the basis of mistaken, false or incorrect information or that it was issued in error - are not unrelated. It is clear that what the CBO believed Mr. Chang intended to build and what he was in fact building were different things. The differences were material to whether the construction would contravene the applicable law. The basis for the misunderstanding was either that the material submitted in support of the permit application did not accurately set out what Mr. Chang proposed to build or that the CBO misunderstood the material. **Whether the error lies with the CBO or Mr. Chang, the fact is that the permit would not have been issued had the error not been made. A building permit issued "based on a misunderstanding of the facts" is issued in error and can be revoked**: Loblaws Inc. v. Ancaster (Town) Chief Building Official, [1992] O.J. No.*

2290, 13 M.P.L.R. (2d) 73 (Ont. Gen. Div.), at paragraph 54." (emphasis added).

Maitland Valley Conservation Authority v. Cranbrook Swine Inc. 2003 CarswellOnt 1470 (Ont. C. A.) is a decision of the Ontario Court of Appeal. At paragraph 41, Abella J.A. (as she was then) states as follows:

> *"41 Nor do I mean to suggest that in such a complex and interrelated regulatory scheme, a building permit can never be issued in error. The Building Code Act, in fact, anticipates this possibility by providing a remedy through, for example, the revocation of a permit under s. 8(10) of the Building Code Act. The relevant portions of s. 8(10) state:*
>
> *8.(1) Subject to section 25, the chief building official may revoke a permit issued under this Act,*
> *(a) if it was issued on mistaken, false or incorrect information; [or]*
> *. . .*
> *(d) if it was issued in error."*

Markham (Town) v. Eastown Plaza Ltd., 1992 CarswellOnt 493 is a decision of the Ontario Court of Justice (General Division). At paragraph 10, Justice MacDonald states as follows (emphasis added):

> *"10 I appreciate that an interlocutory injunction is an extraordinary discretionary remedy which should only be granted in very limited circumstances. (See Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) .The court must look at questions of irreparable harm which cannot be compensated by damages, and it is the tritest of law that the moving party must make out a strong prima facie case in order to meet the threshold. In my view, the moving party in this case makes out such a strong prima facie case.* ***On the basis of a single simple mistake on the part of the plaintiff, a permit was issued. The Building Code Act, R.S.O. 1990, c. B.13, s. 6, contemplates this very situation. The real issue here is the competing interest of the town which represents the public interests of its citizens and the private interests of the defendants,*** *who, notwithstanding the notices given to them, continued to pursue the establishment of their business. There are special considerations applicable to municipalities which were enumerated in a number of the cases cited to me. (See Kamloops (City) v. Southern Sand & Gravel Co. (1987), 43 D.L.R. (4th) 369 (B.C. S.C.) ; Polai v. Toronto (City) (1969), [1970] 1 O.R. 483, 8 D.L.R. (3d) 689 (C.A.) ; affirmed in the Supreme Court of Canada, [1973] S.C.R. 38, 28 D.L.R. (3d) 638 . and Metropolitan Toronto (Municipality) v. N.B. Theatrical Agencies Inc. (1984), 24 M.P.L.R. 241, 44 O.R. (2d) 574, 40 C.P.C. 191, 4 D.L.R. (4th) 678 (H.C.). In my view, the principle enunciated in Metropolitan Toronto (Municipality) v. N.B. Theatrical Agencies Inc., supra, is an*

appropriate authority to be applied in these circumstances. I refer in particular to the Honourable Mr. Justice Craig's comments at p. 580 [44 O.R. (2d)]:
A municipality whose duty is to enforce its by-laws need not show that it will suffer irreparable harm in the same way that it must be established by a private plaintiff. Where by-laws of a municipality are being flagrantly violated a court ought to assist the municipality by granting interlocutory relief." (emphasis added)

The case law that I have summarized clearly supports the authority and obligation of the CBO to act independently from Council. Put another way, it is the duty of the CBO when issuing building permits to ensure that buildings within the Municipality are in compliance with the Building Code.

The law also supports the authority of the CBO to revoke building permits issued in error. In the matter being reported on the CBO identified the error soon after the building permit had been issued.

Specific Findings as related to the Code of Conduct:

Section 14 of the Code:

I find that the Councillor was in contravention of section 14 of the Code. The actions of the Councillor as they relate to the CBO were not "respectful of the role of staff to provide advice based on political neutrality and objectivity and without undue influence from any individual member or faction of Council." The Councillor's actions did not "show respect for the professional capacities of staff" and in this case with respect to the CBO and to a lesser extent to the Municipal Lawyer. I also find that either directly or indirectly the Councillor's actions amounted to the "use, or attempt to use, [his] authority or influence for the purpose of intimidating, threatening, coercing, commanding, or influencing any staff member with the intent of interfering with that person's duties….". I find that the Councillor's actions did not respect the "distinct and specialized roles expected of Municipal staff in both the carrying out of their responsibilities and in dealing with Council." In particular, the CBO's statutory duties as set out in the Building Code Act were not respected or acknowledged.

Implicit threats to take action that could lead to the termination of the CBO were presented to the GM, who felt that he had no choice but to inform the CBO so that he was aware of the consequences of his decisions. Further, the Councillor advised the GM that he had sufficient support on Council to obtain the necessary votes to pass a motion that would deal with the Councillor's perception and belief that the Building Department's actions showed that the Municipality was not "open for business".

Although the Councillor did not directly deal with the CBO, the demands and opinions that the Councillor put to or conveyed to the GM and the inquiries into the CBO's personnel records, were bound to come to the attention of the CBO. I find that the CBO had a genuine belief that his employment with the Municipality was at risk and may still be at risk.

Section 10 of the Code

I have also considered section 10 of the Code. I am unable to find that the Councillor was in contravention of section 10 of the Code. Although my preliminary review of this matter led me to the conclusion that this section had been contravened, in considering the evidence of the Councillor, presented orally and in writing, and in considering the legal position of the Councillor presented through his lawyer, I am unable to find on a balance of probabilities that section 10 has been contravened.

In coming to this finding, I rely on the following analysis. I do find that the actions of the Councillor went well beyond the norm. Expectations forced staff, including senior staff and Building Department staff, to work overtime. This included a Sunday meeting in mid-summer that was held to meet a deadline imposed by the Councillor. If the deadline was not met, the Councillor was threatening to bring the matter before Counsel in its closed session meeting on the following Monday afternoon. Staff gave this matter priority because of the actions of the Councillor.

I must then determine whether or not section 10 is intended to apply to the actions of a member of Council when he or she is directly engaged in Municipal business. Section 10 in defining "private advantage" does not include a matter "that concerns the remuneration or benefits of a member of Council." As such, this section contemplates that it could be invoked when a Council member is voting on a Council matter, being the remuneration to be paid to Councillors. I therefore find that this section does apply to the actions of a member of Council when he or she is directly engaged in Municipal business.

I must then determine whether or not the Councillor is a "friend, or associate…, business or otherwise" of the property owner. The Councillor in his interview maintains that he does not have any special relationship with the owner, and that he was acting on behalf of the property owner exclusively in his role as a Councillor. The Councillor describes the owner as "a constituent that I knew reasonably well." Following my interview with the Councillor, I became aware of The Chatham Daily News newspaper report published on February 21, 2019 (being a date after my preliminary report was released to the Councillor), where the owner had been interviewed. Comments made by the owner during this interview reference the owner's opinion of his relationship with the Councillor. For the purposes of this report I am not prepared to consider this information as being evidence in this matter without giving the Councillor a further opportunity to respond, which would lead to further delays in releasing this report. It would not be in the public interest to delay this report any further, so I am not giving any consideration to this information.

The Councillor's lawyer has also provided a legal definition of "associate" being:

> *"associate", where used to indicate a relationship with any person, means,*
> *(a) any body corporate of which the person beneficially owns, directly or indirectly, voting securities carrying more than 10 per cent of the voting rights*

attached to all voting securities of the body corporate for the time being outstanding,
(b) any partner of that person,
(c) any trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar capacity,
(d) any relative of the person, including the person's spouse, where the relative has the same home as the person, or
(e) any relative of the spouse of the person where the relative has the same home as the person;"

Reference: Written response of the Councillor (received March 15, 2019), para. 83.

This is a very restrictive definition. The Cambridge English dictionary defines "associate" as "someone who is closely connected to another person as a companion, friend or business partner".

I am unable to find on the evidence that I have that the owner was "a friend, or associate" of the Councillor and as such I am unable to find that the Councillor used his status as a member of Council to improperly influence the decision of another person (senior municipal staff including but not limited to the CAO) "*to the private advantage of ....friends, or associates, business or otherwise*."

Sanctions:

The primary remedies available to Council are suspension of a member's pay or a reprimand of the member. As the Councillor is no longer a member of Council, the first sanction, being suspension of a member's pay, is not available. In my opinion the second sanction, being a reprimand of a person who is no longer a member of Council, would serve no purpose. I am therefore not recommending that Council impose any formal sanctions.

This report will however become part of the public record. I encouraged members of Council to consider the findings in this report and recognize that the Code provides strict guidelines when it comes to members of Council's "conduct respecting staff" and "use of [his or her] influence" in cases such as this when interacting with staff.

Dated at Chatham, Ontario this 10th day of April, 2019.

Paul Watson – Integrity Commissioner

Municipality of Chatham-Kent